No. 17933

United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, TRUSTEE, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION No. 1183

BRIEF OF APPELLEES, HULDA S. CARLSON, *et al.*

WILLIAM E. EVENSON

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Attorneys for Appellees, Hulda S. Carlson, Myrtle L. Strine, Luella Greeley, Florence Macke, John W. Phillips and Jean S. Phillips.

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Appeal from the United States District Court for the Western District of Washington, Southern Division No. 1183

BRIEF OF APPELLEES, HULDA S. CARLSON, *et al.*

NATURE OF CASE

This action is brought by an incorporated Indian Tribe (Tr. 6) constituted under an Act of Congress with power to sue and be sued. Ex. 1, Art. 5(i). The action is not brought by Indians as such nor by any aboriginal group nor by incompetents. The corporation instituted and maintains this action in its own name for its own account.

We do not know who is prosecuting this appeal since the Notice of Appeal (Tr. 119) is stated to be on behalf of "Skokomish Tribe of Indians." Compare Exhibits 1 and 62.

This action was brought to quiet title (Tr. 23) to a narrow strip of "tidal land" (Fdg. 21; Tr. 93) which is alternately submerged and exposed with each turn of the tide twice a day and has been from time immemorial.

The strip is of no value except to the abutting upland owners as a means of access to navigable water.

The upland ownership by appellees is not in question. The tidal strip is bordered on the land side by the private property of appellees and on the water side by public navigable water. If the strip were not owned by appellees it would be only a basis for extortion against appellee upland owners. Appellant owns none of the abutting uplands and would have no access to the strip except via the water, and then only if the tide was out. Fdgs. 9, 10, 11; Tr. 91.

The theory of appellant's action was that the legal description of the land formerly comprising the Indian reservation as set forth in the Executive Order creating the reservation (Ex. 4) expressly included the tidal strip and hence the title to the strip should be quieted in the incorporated plaintiff as some form of successor to the original tribes which were settled upon the reservation pursuant to the Executive Order. Neither the Treaty (Ex. 3) nor the Executive Order included the tidal strip in the reservation. Fdgs. 4, 7, 23, 24; Tr. 89. The exact exterior boundaries of the reservation were surveyed and documented in 1862. Ex. A-14-1, attachment "B." The abutting uplands have long since been regularly disposed of by Indian allottees and there is no Indian or reservation land along any of the water-front. Fdgs. 9, 10, 11; Tr. 91.

This action does not and never has involved "fishing rights." The Treaty relied upon by appellant in Article 4 thereof says:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . . ."

No one has challenged any rights of Indians to exercise any privileges granted by Article 4 of the Treaty. No issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

Appellant being unable to establish the tidal strip to be within the limits of the described and established reservation area sought to have the trial court speculate and infer that perhaps the tidal strip had contained sufficient edible shell fish in 1855 or 1874 to have constituted a necessary part of the subsistence and economy of the aboriginal Indians and hence should have been indispensably an appurtenance of the reservation. An issue of fact on this proposition was made at the beginning of this action and maintained throughout. See particularly the Pretrial Order No. 16008 — Tr. 85, 86, 97, 99. The issue was not only whether this tidal strip could or ever did contain usable quantities of shell fish, but also whether these or any Indians ever were dependent upon or derived material subsistence therefrom. The trial court after hearing a wide range of testimony and evidence, including all the hearsay that appellant could muster, expressly found against such contention of appellant. Fdgs. 14-20; Tr. 92-93. In Finding 16, Tr. 92, line 23, please correct the exhibit number to 62, rather than A-62. This tidal strip has never been and is not now a source of shell fish in usable quantities. Fdgs. 20, 21; Tr. 93; Fdg. 31; Tr. 95. The nature of this particular locale of low salinity (Fdg. 22; Tr. 92) explains why shell fish and marine life of interest to Indians were found several miles distant from this tidal strip. Fdg. 19; Tr. 93; Ex. A-62. Thus this issue could not blithely be disposed of by conjuring

up "judicial knowledge" that Indians were known to eat fish.

The appellees on whose behalf this brief is submitted are concerned only with the tidal strip along the northerly 5/8ths of a mile, approximately, of the former reservation in Section 26. In Section 26 the tidal strip is specially narrow, rocky and gravelly. Fdgs. 20, 21; Tr. 93; Ex. A-3-7.

The main highway, U.S. 101, skirts the Hood Canal area and traverses the Indian Reservation. Ex. A-48, A-62. All the land in Section 26 between the highway and the waters of Hood Canal have long also been legally allotted to Indians and legally conveyed by them with government approval to and vested in appellees and their predecessors in title. Fdgs. 9, 10, 11; Tr. 91.

Section 26 also has a separate interesting and pertinent history showing its inclusion in the reservation only by separate and later proceedings. It was purchased by the government from a homesteader Fisher pursuant to a special Congressional appropriation for addition to the reservation, and was not carved out of the public domain, as was the balance of the reservation. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3 and A-14-4. The significance of this difference will be commented upon later.

ARGUMENT IN ANSWER TO APPELLANT

AMBIGUITY RULES NOT INVOLVED

Appellant's argument about an ambiguity in either treaty or executive order was never made in the trial court at any time during the many years this action has been pending. See particularly the Pretrial Order. No. 16008 — Tr. 80, and Plaintiff's Contentions, p. 82, Issues of Fact Claimed by Plaintiff, p. 96, and Issues of Law Claimed by Plaintiff, p. 99.

The suggestion that either the treaty or the executive order were ambiguous is made for the first time in appellant's brief and in this court.

The trial court found these documents and all historical background material clear, unambiguous and factual, and expressly not including or manifesting any intent to include this tidal strip within the legally defined reservation. Fdgs. 3, 4, 5, 6, 7, 23, 24; Tr. 89-98.

The whole object of the treaty negotiation and ultimate establishment of the reservation was to provide a basis for opening up and settling the region and for surveying and laying out the region for disposition to settlers and by exact land descriptions, with the natives resettled upon exactly defined reservations, to be set aside for their exclusive occupancy. The interval of time between the treaty of 1855 and the executive order of 1874 is the period during which such government land surveys were carried out. No townships, no sections, no legal descriptions for the reservations or for patents to settlers could be expressed until such surveys were complete. Ex. A-14-1, attachment "D" at

p. 2. The exterior boundaries of the reservation were surveyed and legally described in field notes. Ex. A-14-1, attachment "B."

Appellant recites concern over a river margin of the reservation, but that margin of the reservation is not involved in this lawsuit and hence we refrain from a discussion of the river matter.

A width of 200 feet stated by appellant for the narrow, rocky tidal strip in Section 26 is obviously inadvertent. Fdg. 21; Tr. 93; Ex. A-3-7.

RULE OF CONSTRUCTION FOR TREATY OR EXECUTIVE ORDER

Assuming that the treaty and/or the executive order are subject to interpretation, how should the pertinent language thereof be construed? The pertinent language of the treaty is:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, *to be hereafter set apart, . . .*"

The pertinent portion of the executive order is as follows:

> " . . . thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

The general rule is that in grants or conveyances where a call of a legal description is to the shore of the sea or bay or other body of navigable water, or where the shore or shoreline of such body of water is designated as a boundary, that the high water mark is the

limit of such call or boundary line. This rule was established by the United States Supreme Court in the early case of *United States v. Pacheco,* 2 Wallace, 69 U.S. 587, 590, 17 L.Ed. 865. At page 590 the court says:

> "The position, that by the bay as a boundary, is meant, in this case, the line of low water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails."

In this case one of the boundaries was designed as "the Bay of San Francicso."

Disposal of public lands during the territorial period are not lightly to be inferred. Lands under navigable waters are to be deemed held for the future state. See decision involving The Red Lake Reservation in Minnesota.

> *U.S. v. Holt State Bank* (1926) 270 U.S. 49, 70 L.Ed. 465.

The above rule is again referred to in *Shively v. Bowlby,* 152 U.S. 1, 38 L.Ed. 331, at page 29.

But appellant contends that the ordinary rules of construction should not apply, and that the treaty and executive order should be interpreted as the Indians understood them, and that the Indians understood they were to include the tidelands bordering on the reservation. We think this position, on both counts, is untenable.

Appellant quotes from *Worcester v. State of Georgia*

and cites other cases with similar language. This language, frequently quoted in behalf of the Indians, is to the general effect that since they were an unlettered people and were not in a particularly good bargaining position, that any uncertainties or ambiguities in treaties should be construed in their favor.

We submit that the application of this language has been clarified by later Supreme Court decisions involving interpretation of Indian Treaties. These cases are:

Choctaw Nation v. U.S., 318 U.S. 423, 87 L.Ed. 877 (1943);

Northwestern Shoshone v. U.S.; 324 U.S. 335, 89 L.Ed. 985 (1945);

Ute Indians v. U.S., 330 U.S. 169, 91 L.Ed. 823 (1947).

In the *Choctaw* case, *supra,* the dispute actually was between the Choctaw Indians and the Chickasaw Indians, and the question was whether the Chickasaw were entitled to compensation from the Choctaws for lands allotted from a common reservation to the Choctaw's slaves. Determination of this question depended upon the interpretation of a treaty between the two Indian tribes and the United States. The court says beginning at page 431 of the U.S. Report:

> "Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a

spirit which generously recognized the full obligation of this nation to protect the interests of a dependent people.' (Citing cases)

"*But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.* (Citing cases) Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language."

In the *Shoshone* case, *supra,* usual argument was made that any inference from the treaty language, should be construed to favor the Indians. The court said at page 353:

"Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian of the Indians, to our ward's prejudice. 'All doubts,' say petitioners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia,* 6 Pet. (U.S.) 515 at 582, 8 L.Ed. 483, 508, said 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties

meant by the treaty. *We stop short of varying its terms to meet alleged injustices.* Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

In the *Ute Indian* case, *supra,* because of an error in a boundary survey of an existing reservation, the president by executive order added some additional land to the reservation. Subsequently the reservation was ceded back to the United States by the Indians, and the Congress agreed to pay the Indians for the land ceded back. The question was whether the Indians were entitled to compensation for the land described in the executive order. In response to the argument that the Indians thought they owned the executive order lands at the time they ceded the reservation back to the United States, and hence should be compensated for the same, the court says, beginning at page 179:

"It is said, however, that the Indians understood in 1880 that they owned the Executive Order lands which lay north of the White River Valley; that they understood their 'present Ute Reservation' to include them; that they understood that Congress undertook by the 1880 Act to sell the lands for their benefit; and that Congress was aware of this understanding. The majority opinion of the Court of Claims stated that 'in all probability' this was true. The writer of the concurring opinion thought differently. But even if the Indians had believed that they had a compensable interest in the Executive Order lands, this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority.

The Sioux Indians may also have thought the President had authority to convey title to them; but the reasons on which our decision in the *Sioux* case (U.S.), *supra,* rested do not indicate that our holding depended in any way upon the understanding of the Indians. Nor can this alleged understanding be imputed to Congress in the face of plain language and a rather full legislative history indicating that the 1880 Act neither conveyed nor ratified conveyance of these lands. While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create Presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation v. United States,* 318 U.S. 423, 431, 432, 87 L.ed. 877, 882, 883, 63 S.Ct. 672. *We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so."*

ENLARGEMENT OF RESERVATION FOR SHELL FISHING

Appellant would have this court enlarge the reservation defined in the executive order to include the tidal strip as a place on which it might shell-fish, premised on the theory that the Indians anciently did occupy and use this particular tidal strip for actual shell fishing; that shell fish in usable quantities actually could be found in this particular strip; that the subsistence of the Indian tribe was dependent upon the shell fish of this beach to a material extent; that it should have been

the intention of the United States to encompass the tidal strip in the reservation, and accordingly that the treaty and the executive order, together, should be construed to include the tidal strip as a part of the original reservation, but not as a part of that which has been allotted and disposed of by the Indians with government approval. These contentions are disputed by appellees.

The Skokomish Indians and associated Indians were river people whose subsistence was primarily geared to easily procured salmon and who never had more than a casual interest in the beach along the tidelands in question. Fdgs. 14 through 22. They lived primarily in villages up salmon rivers (Tr. 331), although by their canoes they could travel the river, Hood Canal and other parts of Puget Sound. Tr. 414, 344, 328, 190. This particular tidal strip never was a habitat for a usable amount of shell fish life of native varieties prior to the introduction of other varieties by white men. Tr. 691, 743, 705, 733, 756, 697. Far better locations for shell fish were accessible at other places on Hood Canal, such as Hoodsport (Tr. 744, 752, 688, 756), Brinnon (Tr. 352), Patricia Beach (Tr. 332-3), Belfair (Tr. 240, 349-351, 405, 496), Red Bluff (Tr. 742). On the map, Exhibit A-62, other leading sites are marked in red and at a substantial distance from the litigated strip. Shell fish were only an occasional delicacy. Tr. 334. These tidelands not only were not a source of shell fish life, but the economy and subsistence of these particular Indians and their predecessors was not and could not have been dependent upon the shell fish of this strip. There never was in any of the correspondence or literature of the

times anything to suggest that these particular tidelands were a material, let alone an essential part of the basis for subsistence of these Indians.

FISH-EATING NOT SAME AS SHELL FISHING

There is no question that native Indians eat fish. Primarily this was salmon. In the case of these Indians it was almost entirely salmon. Fdg. 14. Other sea life or shell fish when desired were procured where it was natural and easy to do so. See red circles on Exhibit A-62. Shell fish were not obtained from this particular beach to any material extent, if at all.

The only significance of fish-eating habits of the early Indians is in reference to appellant's claim that subsistence and survival imperatively required the boundaries of the reservation to be enlarged as a matter of law and interpreted to encompass a particular strip of beach.

Appellees say the facts do not support the premise that this beach was an essential source of subsistence, nor does the law permit re-writing the executive order now.

Appellees have contended from the beginning that this particular beach was never a reasonable source of shell fish, nor was it ever so used or depended upon by any Indians, and that there could be no basis for judicial notice to the contrary.

The Indians were fish-eaters, but not particularly shell fish-eaters, and certainly not from this beach.

Appellees disagree with appellant's contention that plaintiff has proved that anciently this beach was used

as a principal source of livelihood for the Indians. So did the trial court. Fdgs. 14 through 22.

ENVIRONMENTAL FRAMEWORK

The minutes of the council meeting between Governor Stevens and the Indians (Ex. 10) contain specific reference to salmon and river fishing, and no reference whatever to shell fishing.

The treaty does not deal with tidelands or beaches.

The quotation from the treaty with reference to taking fish at usual and accustomed grounds and stations is not an issue. No one disputes the right of the Indians to fish at accustomed places to the extent permitted by the treaty. Nothing in the pleadings or pretrial order involves an issue as to fishing rights. Such is not a land title matter. This lawsuit concerns land title not fishing.

INDIAN USE AND OCCUPANCY

The Skokomish Indians were river people. According to the sources of their language Skokomish means river people. Tr. 370. They primarily were concerned with living on rivers and creeks where salmon would run. Tr. 331, 267, 354, 357, 358, 362. The salmon were a very abundant food source and readily obtainable from the rivers and creeks. Tr. 326, 334-5. The precarious, uncertain and difficult task of digging in gravel and rock or even in mud for shell fish would have been very unattractive by comparison with the ease of procuring salmon. Tr. 499, 705.

Professor Elmendorf in his book (Ex. 60) at pages 255 and 257 and 258, definitely ties these Indians to the

salmon fishing creeks and streams. This same fact is manifest in the Myron Eells publication at page 605. Ex. 57.

Professor Elmendorf evidently testified directly in the Indian Claims Commission case because in Exhibit 62, the findings at page 6-143 and at page 6-144 cite Elmendorf for the proposition that there were nine basic villages, all of which were at the mouths of rivers entering Hood Canal. It should be particularly noted that the Skokomish were fixed by him as being primarily located at the forks of the Skokomish River and other bands at Vance Creek westerly of the fork. The court will note on the large map, Exhibit A-62 (the only exhibit showing all of Hood Canal and the reservation area), that the fork of the Skokomish River is westerly of the present reservation and that Vance Creek is westerly of that. Both locations are a considerable distance from the mouth of the river and far from most of the beach property in litigation. Professor Elmendorf's book (Ex. 60) at page 38 in referring to Potlatch, Site No. 39, noted that the site had no creek (Tr. 218) and on that account would never have been used for more than temporary camps in aboriginal times. Note: no exception has been taken to Finding 17.

The topographic map of 1884 (Ex. 36) shows reservation buildings to be on the river, which is to be expected. In the region of Potlatch the only notation is cobblestones and gravel.

Exhibit 5 being field notes concerning the exterior boundaries of the reservation details the running of actual lines throughout many courses of the reservation area for the purpose of locating the township lines, sec-

tion corners, quarter corners and sixteenth corners and recites in Exhibits 5-o and 5-q encountering Indian houses. These, it will be observed, were encountered in Section 12 and hence on the river. The exterior boundaris of the reservation are also described in Ex. A-14-1 attachment "B."

Exhibit 41 is the township map for Township 21 North, Range 4 West, and on it will be observed the top tier of lots remain unsurveyed, but all the river bottom land was surveyed.

The reservation area finally selected was no wilderness casually assigned to Indian use. This was a rich location with timber on the higher ground, the largest river entering Hood Canal, with a virtually inexhaustible supply of salmon and other fish, and the largest amount of river bottom farming land in the region. It is noted at the conclusion of the surveyor's notes, defendants' Exhibit A-14-1, attachment B, page 7:

> "This reservation is very well selected for farming purposes."

We suggest there was no reliable evidence of any actual use and occupancy of the tidal strip by the Indians or their predecessors.

Manifestly, it was impossible actually to occupy an area over which the tide ebbs and flows, and this would have been particularly true of primitive people without means of building stone or concrete bulkheads, revetments, dikes or other structures into tide water. Obviously the only occupancy or use which the Indians could ever have asserted to the tideland strip would have been the possibility that they from time to time went upon it as a clear trail at low tide to avoid the

brushy upland. It is defendants' position that the strained efforts of plaintiff's witnesses to account for the possibility that their ancestors may have gone upon this tideland strip from time to time for shell fishing or other uses is insufficient to sustain any finding of material use or occupancy. The hearsay testimony offered over objection (Tr. 178, 374) justifiably could be considered most unreliable, and manifesting no more than common knowledge that anciently the Indians from time to time, where they could have done so without undue effort, would have procured shell fish. This area we will show under a separate heading was not such a place to which it is likely the Indians could have or would have resorted for shell fish.

Witness after witness conceded that the Indians ranged up and down Hood Canal (Tr. 190, 248, 250, 327-9, 344-5, 414, 427) when they were not fishing in the rivers, and that there were numerous places both toward the head of Hood Canal at Belfair (Tr. 240, 349-51, 405, 332-3) and toward the mouth in the direction of Quilcene (Tr. 352, 744, 752, 756, 688-9) where there were good shell fishing areas. The complaint refers to this tidal strip as being an excellent and profitable source of shell fish having a high commercial value. No evidence was ever submitted to sustain such an allegation. Finding 31, Tr. 95. There is hardly evedence in the case of enough clam digging possibilities in this area for so-called sports fishing, let alone for either a commercial operation or to provide any significant basis of livelihood for any single family or group of families.

SHELL FISH NEVER EXISTED IN USABLE QUANTITIES ON TIDELANDS IN ISSUE

The tidelands bordering Annas Bay being the bulge at the elbow in Hood Canal are not and never were a source of shell fish of a type or quantity that would have been resorted to in aboriginal or modern times to provide a livelihood, and never were so considered.

The studies of Dr. Jerome Stein reflected in his testimony (Tr. 577-669) and in the Exhibits A-49 to A-58, inclusive, fairly establish that the area is not one productive of sufficient shell fish life to warrant any conclusion that primitive tribes could in any degree have been dependent upon this stretch of tidelands. He showed that the tidelands abutting the reservation on the west side of Hood Canal are rocky and gravelly and rather narrow, and that a muddy or siltier type of tideland existed at the south margin of Annas Bay adjoining the mouth of the Skokomish River because of the estuary-like characteristics of the mouth of that river silting up the general region. His testimony explains how the Indians could mistake some of the clams they might presently find in this area for those which were originally to be found in Puget Sound waters. The bulk of the clams he could account for are of varieties that did not exist prior to the coming of the white man. He has shown the court that this region was not a natural habitat for shell fish. His curiosity extended beyond such physical findings from extensive digging throughout the beach area to an investigation of what characteristics the water had in the region which might account for the lesser amount of shell fish life in this area than might be found at Hoodsport and to the north where

his laboratory was located. The most obvious characteristic is the large flood of fresh water into Annas Bay. The Skokomish River is the largest fresh water inlet into Hood Canal and is a very large river drawing on a large drainage basin from two major forks of the river. All of this fresh water anciently and still does enter Annas Bay. Today, from time to time a portion of the river water enters Annas Bay at the Tacoma Powerhouse, rather than the river mouth, but still basically into the same bay. Dr. Stein tested the salinity of the water and tested the effect of salinity on the shell fish life in the region, from which it was quite manifest that this entire bay area has a salinity much below that of other parts of Hood Canal and that this salinity factor has a direct relationship to the ability of shell fish to survive.

There is reason to suppose that the testimony of appellant's witnesses that shell fish are procurable from this beach today may have been exaggerated when consideration is given to the testimony of Wallace Hanson and his wife, Alice Marie Hanson. When they burned out in 1946, and were for a year and a half obliged to live off the beach in any way they could, they got a major portion of their subsistence from shell fish that they had procured north of Hoodsport, being far north of the strip in litigation. Tr. 697. They did not obtain the same from any of the beach area in question. Tr. 692, 696-7. This is particularly significant proof of the limited "shell fish value" of this beach since the Hanson family owned Minerva Park, Enati Beach and additional beach extending toward Nalley's and thus the largest amount of this waterfront in any single

ownership. Tr. 686. The simple fact is that in desperation for life the Hansons did not even turn to their own beach property at the Skokomish reservation, but went to other places on Hood Canal. We are confident the aboriginal Indians must have done likewise.

Witness after witness acknowledged the desirability of seeking shell fish up toward Belfair and down the canal in the other direction and across on the opposite side from the Skokomish River. Evidently to take advantage of the more desirable shell fishing in these other areas, whole families would embark in large canoes sufficient to carry numerous people and they would be gone for a considerable period of time while they availed themselves of the resources of these other regions. Note places circled in red on the map of Hood Canal, Exhibit A-62.

It is noteworthy that Professor Elmendorf in his citation of places (Ex. 60) at which the Indians resided or established themselves at any time for any purpose indicates Site No. 117 at *Patricia Beach* as the closest one identified as a site for clam digging. This Site No. 117 is described on page 47 of his publication, and its relative location is to be seen on the map opposite page 48 of his book, and shows the same to be a considerable distance toward Belfair from the Town of Union. The attention of the court is invited to the four-township map, Exhibit A-48, and the total Hood Canal map, A-62 on which the present-day Patricia Beach tracts appear and undoubtedly identify the region referred to by Professor Elmendorf at Patricia Beach. It can thus be seen that the first clam digging site worthy of comment as such by Professor Elmendorf was many miles

eastward from the Skokomish River and the Skokomish Reservation.

JUDICIAL NOTICE OF SHELL FISH SOURCES

The rule of judicial notice urged by appellant is applicable principally in a situation where no issue is framed, no other proof is available or evidence is in the record and there are no findings of fact.

Here, as noted in our discussion under Nature of the Case these matters were in issue, they were contested, proof was offered, the integrity of witnesses was before the trial court, express findings were made from evidence and without speculation, inference or judicial supposition.

Certainly these Indians ate fish, particularly salmon. It is not true that they depended upon shell fish or that this tidal strip was the source of the shell fish they did use. They had better and easier sources.

SUBSISTENCE OF TRIBE NOT DEPENDENT UPON SHELL FISH OR THE BEACH

The contention of appellant that the tidelands impliedy must be regarded as having been a part of the area assigned for reservation purposes because the subsistence of the tribe was dependent upon the use of the beach and particularly for shell fish is not borne out by the facts.

The treaty itself and the available evidence of matters leading up to the treaty contain virtually nothing to justify the thought that shell fishing, particularly at this location, was significant.

The treaty (Ex. 3) in Article IV, contains the only

reference to shell fish and that as a specification that the Indians "shall not take shell fish from any bed, staked or cultivated by citizens." The same treaty, Article IV, in the only reference to fishing states "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens. . . ." The fact is that this particular reservation location is not identifiable from the treaty nor was it intended to be since the reservation was to be something "hereafter" set apart, nor was access to shell fish a matter which drew particular comment.

The minutes of the meeting of Governor Stevens with the Indians at Point-No-Point on January 26, 1955 (Ex. 10) reflect no reference to shell fish. On page 2 of the typewritten transcript in evidence, the first Indian to speak was a Skokomish who said: "I wish to speak my mind as to selling the land, great Chief! What shall we eat if we do? *Our only food is berries, deer and salmon.* Where then shall we find these? I don't want to sign away all my land, take half of it and let us keep the rest." Fdg. 14.

The second of the Indians to speak said he did not want ". . . to leave the mouth of the river."

The agent explained that if they kept half their country, they would have to live on it and would not be allowed to go anywhere else they pleased. That if a small tract was reserved for the reservation they would have the privilege of going wherever else they pleased to fish.

Following this explanation, the Duke of York said: "My heart is good. I am happy since I have heard the

paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only." Again he says: "We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get *salmon* and when done fishing will return to our houses."

Such migrations of the aboriginal Indians of this area as occurred followed the variations in the salmon runs. Exhibit 62 at pages 6-157 and 6-146.

Throughout the testimony of Professor Elmendorf (Ex. 60) there are repeated references to the significance of salmon and the salmon fishing sites as the actual historic basis for the subsistence of these particular bands of Indians and in this region. On page 34 of his book, Site No. 18 is described as the principal Skokomish settlement in prewhite times. He notes that there was a fish weir at that point, and this was the third in the river, counting from the mouth. The first 31 sites he identifies on pages 32 to 37 in his book are located on the Skokomish River. These are clearly the principal headquarters of these people, and the prime reason manifestly was easy salmon fishing in a comparatively sheltered area. The only site Professor Elmendorf identifies between the mouth of the Skokomish River and Potlatch are Sites No. 32 to 39 on pages 37 and 38 of his book. None of these are identified as a location for shell fishing, and none are identified as a basis for any form of fishing, although at Site 37 reference is made to herring spawning in a little cove.

As already noted the closest site identified for clam digging is Site 117 many miles eastward.

The attempt by hearsay evidence to establish this tidal strip as essential to subsistence of the aboriginal tribes and hence presumptively intended to have been a part of the reservation cannot be sustained by the evidence.

Likewise, if for any reason the tidelands should impliedly be deemed a part of the reservation, there was no reason from the standpoint of tribal subsistence to treat the tidal strip as withheld from the allotments heretofore made and sold, particularly when no access was preserved to such tidelands except from the water side.

All these matters were put at rest by the findings of the trial court. Fdgs. 14-22, 31; Tr. 92-95. These represent the court's evaluation of the witnesses, testimony and evidence. We suggest these findings are beyond challenge.

SUBMERGED RESERVATION AREAS

Appellants cite three situations where courts have been concerned with submerged areas in reservations.

Appellant cites *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, in which the reservation for the Indians there involved was referred to as "body of lands known as the Annette Islands, situate in Alexander Archipelago in Southeastern Alaska." This was held to include the whole group of islands with intervening waters and submerged lands between.

Appellant cites *Donnelly v. United States,* 228 U.S. 243, a murder case where jurisdiction depended upon title to the bed of the Klamath River where the deceased was shot. It was held on page 264 if the rive

was a non-navigable stream, title would be in the United States, and if the river was in fact navigable, the California Legislature had by two specific acts vested title to the bed of the river in the United States as a riparian owner, hence the place of the offense was on United States property under either theory.

Appellant cites *Moore v. United States,* 157 F.2d 760. The Skokomish treaty in Article II states: "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, *viz.*: The amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal . . ." It is of interest that the Skokomish treaty with this specific provision for six sections of land is unlike so many treaties, such as the Quillayute treaty with which the *Moore* case is concerned, where similar wording also specified a tract of land "sufficient for their wants." This latter specification concerning the future wants of the Indians, not in the Skokomish treaty, would impose an extra obligation upon the United States and does suggest why a court would expect to interpret a later executive order as designed to discharge that obligation. Actually the Skokomish Indians and their predecessors were not dependent upon the tidelands in question, nor even on shell fish if such had been reasonably procurable from these tidelands. The Quillayute case shows proof of many facts concerning actual Indian industry and commerce upon and use of the river area by the Indians by the time of the executive order. The State Fisheries Department was enjoined from its attempt to regulate the Indians out of their use of the river for fisheries.

FISHER DONATION CLAIM STANDS ON DIFFERENT FOOTING

Appellees submitting this brief are claimants to property in Section 26 which was not a part of the original reservation, but was in the Fisher Donation Claim and added to the reservation by purchase from Fisher. On that account their position involves an element additional to that of claimants to tidelands not in the former Fisher Donation Claim.

The original reservation evidently was in operation a considerable time before the formal surveys could be made or an executive order issued. The original reservation did not reach as far north as Section 26, and in fact, did not even reach to the north margin of Section 35. Exhibit 6 undertakes to show the subdivisional lines and meanders of the Skokomish Indian Reservation, December 2, 1873, and plainly shows the north boundary of the reservation within Section 35 and short of Section 26.

Exhibit 7 is a diagram of April 24, 1874, for the purpose of showing the *additions* to the Skokomish Indian Reservation per the executive order dated February 25, 1874. The heavy line on the exhibit marks the original reserve. This is also reflected in Exhibit A-10, being a survey of Township 22 North, Range 4 West, of July 26, 1873, and is clearer than Exhibit 38 which bear[s] some alterations.

Exhibit A-14-1 carries an attachment B, being the surveyor's notes concerning the *exterior* boundaries of the Skokomish Indian Reservation, on page 6 of the typewritten transcript of which it is noted he set a post on the south boundary of the Fisher Donation Claim

This exhibit A-14-1 on the second page records the recommendation of the addition of the Fisher Donation Claim as represented by the blue lines on one of the attachments, and on page 3 proposes that this be purchased from Fisher. The sketch with the colored lines clearly showing the original reservation and the proposed addition of the Fisher Donation Claim is the document identified as attachment C annexed to Exhibit A-14-1.

The story concerning the proposed addition continues in attachment B to the same exhibit, and from Ex. A-14-4, we gather that in 1862 the Indians entered upon the Fisher property although it had not yet been acquired. That in 1869 Fisher was told by the government that it had been decided not to acquire his property. Then in 1870 the improvements on the Fisher property were destroyed by the Indians, after which in 1874, a recommendation for the enlargement of the reservation by adding Fisher's property to it was renewed.

FISHER DONATION CLAIM DIFFERENT FROM ORIGINAL RESERVATION

Fisher settled upon the area constituting the Fisher Donation Claim, which now constitutes all the Section 26 frontage of the former reservation, under the Oregon Donation Land Act of September 27, 1850. 9 Stat. 496. Exhibit 1-14-4, page 4. Both Exhibit A-14-4, page 4, and attachment D to Exhibit A-14-1 show that Fisher had proved up and perfected his rights and was entitled to a patent to the property long before the recommendation for adding his property to the reservation came up.

The only reason that the patent could not actually issue to Fisher was that the survey of 1873 had not yet been made, and until made in Section 26 (Ex. A-9, A-10 and 38) a description could not be inserted in a patent form. Nevertheless, the law accords to Fisher the equivalent of title from the time he proved up and became entitled to one. *Cosmos Exploration Co. v. Gray Eagle Co.* (1903) 190 U.S. 301, 47 L.Ed. 1064.

Exhibit A-14-2 further shows the validity of the claim of Fisher to his property and the proposal to purchase his property for addition to the reservation.

Exhibit A-14-3 is the draft of the proposed bill providing for the acquisition by purchase from Fisher of his property. This later was enacted. See 23 Stat. 246. All of defendants' Exhibits A-14-1 through A-14-4 bear out the desire to add the Fisher property to the present reservation which had been set up pursuant to the treaty and to acquire the Fisher property by purchase as a desirable addition.

DID FISHER DONATION CLAIM INCLUDE TIDELANDS?

The easterly boundary of the Fisher Donation Claim under all applicable rules of law should have stopped at the line of ordinary high water or the meander line whichever was most seaward. A patentee and grantee from the United States could not get title beyond the line of ordinary high water, and that land which was below navigable water and below the line of ordinary high water would have been reserved for the State to be formed.

The emphasis throughout all the material discussed

above with reference to the Fisher Donation Claim shows the anxiety to acquire and attach to the reservation this upland property to which Fisher was entitled to a patent under the Donation Land Law. Not one word enters into any of this documentation to suggest that there would be added on the north and encompassed with the Fisher Donation Claim a narrow gravelly tideland strip between the high and low water mark as the tide would daily recede. Not one word appears in the documentation to suggest there existed a shell fish subsistence area abutting the Fisher Donation Claim that would also be a desirable addition to the reservation.

The only thing in Section 26 that was added to the reservation was the upland Fisher Donation Claim. Tidelands in Section 26 were never intended to be and never were added to the reservation.

The government deraigns its title to so much of the reservation as it existed in Section 26 by purchase and acquisition from Fisher. Thus, plainly, in allowing Fisher to settle upon and prove up on Section 26 as it fronted Hood Canal, the government was anticipating that the abutting tidelands would eventually be subject to disposition solely at the instance of such State as would be formed out of the territory.

SURVEYS NOT IRRELEVANT

The surveys actually made and legal descriptions filed of actual *exterior* boundaries of the reservation (Ex. A-14-1, attachment "B"; and Ex. 5 f and 5 b) show an interpretation of the reservation boundaries by the persons closest to the actual situation who were

on the ground and whose actions best reflect the intention of those concerned at the time, with locating and defining the actual reservation. This is the most reliable evidence in the record of contemporaneous administrative interpretation, rather than the hearsay testimony cited by appellant.

We do not have here a problem of erroneous or conflicting surveys such as were the subject matter of the cases cited by appellant.

APPELLANT A CORPORATION AND *SUI JURIS*

Appellant quotes from its charter (Ex. 1) the detailed provisions showing its chartered authority as approved by the Secretary of Interior pursuant to the 1934 Act of Congress, authorizing the incorporation. We agree appellant, under the charter adopted April 2, 1938 and approved May 3, 1938, is by Article I "a body politic and corporate of the United States of America, under the corporate name The Skokomish Indian Tribe," and in Article 5 (i) has had complete power and authority to sue and be sued since its incorporation. Appellant is a corporation with a federal charter and has been and is *sui juris*. As such appellant is not immune from all the usual rules of equity, estoppel, waiver, and statutes of limitation to which competent legal entities are subject.

In its corporate capacity appellant has been and is waging its claims against the United States before the Indian Claims Commission. Ex. 62. That is where appellant should seek the kind of relief or adjustment it erroneously pursues here.

Solicitude of the courts for Indians is expressed in

many opinions but there are also other cases recognizing such solicitude may not be turned from a shield to a weapon.

Felix v. Patrick, 36 Fed. 457, 461, 462 (CC Neb. 1888), 145 U.S. 317, 36 L.Ed. 719;

Pope v. Falk (Kan. 1903) 72 Pac. 246 (appeal dismissed 201 U.S. 651, 50 L.Ed. 906);

Dunbar v. Green (Kan. 1903) 72 Pac. 243, 245.

CONCLUSION

Appellees maintain the record shows:

1. Executive order and treaty do not describe or include tidelands.

2. Surveys and history show tidelands never included or intended for inclusion in reservation.

3. Executive orders for other reservations made at same time specifically included tidelands. Ex. A-1.

4. Tidelands are held for State to be formed out of territory. Exception for Indian lands actually set aside is inapplicable here.

5. Allotments exhausted access to tidelands and inferentially carried whatever rights in tidelands might have been attributable to uplands.

6. No title in tribe as such to warrant a quiet title action. Title in U.S.A. Plaintiff must prevail on strength of own title. *Perfect Circle Co. v. Hastings Mfg. Co.,* 88 F.(2d) 813.

7. No title could be in incorporated plaintiff to warrant a quiet title action. *Hynes v. Grimes Packing Co.* (1948) 337 U.S. 86, 107-110.

8. Reservations set aside by executive order do not involve a grant of title to any Indian or Indian tribe.

9. Aboriginal title not involved.

10. No federal question involved in quiet title action or boundary action. No treaty interpretation is involved.

11. Proper rule of construction of a treaty or executive order does not include rewriting either the treaty or the order to afford relief for alleged inadequate treaty or order.

12. Appellant's claim is against United States (as asserted in Indians Claims Commission proceeding, Exhibit 62). Claim should be addressed to Congress.

13. Executive order description and treaty not vulnerable to enlargement on theory of necessary shell fishing. Indians did not depend upon shell fish but found them only as an occasional delicacy; these tidelands not a natural habitat for shell fish; other areas were resorted to for shell fish; these tidelands were never intended for shell fishing or reservation purposes by these salmon-eating river people.

14. All the reservation abutting the tidelands was allotted and disposed of to appellees' predecessors. There would be no access to tidelands except by trespassing on appellees' uplands.

15. Treaty minutes, Elmendorf testimony and al records emphasize salmon economy and subsistence and minimize so-called shell fishing interests.

16. Fisher Donation Claim was purchased by United States from Fisher to add to then "present" reserva

tion as it had already been located, surveyed and occupied.

17. No proceedings incident to acquisition of Fisher property or drafting of description for executive order or officially defining reservation ever showed intent to include tidelands.

18. Appellees' use and occupancy goes back early in century to time of first State tideland deeds or earlier.

19. Appellees' use and occupancy has been continuous under claim of right and payment of taxes.

20. There has been no Indian use or occupancy nor need for any.

21. Appellees and their predecessors have bought in good faith for value from Indian allottees with full government approval.

22. Laches and limitation do apply to appellant and appellant is barred to recover the relief prayed for.

23. Appellees were entitled to the decree appealed from quieting their title.

Respectfully submitted,

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